

1 HONORABLE RICHARD A. JONES
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 STEVEN C. WILSON,

11 Plaintiff,

12 v.

13 HARTFORD INSURANCE COMPANY
14 OF THE MIDWEST,

Defendant.

CASE NO. C10-993RAJ
ORDER

15 **I. INTRODUCTION**

16 This matter comes before the court on the motion of Defendant Hartford Insurance
17 Company of the Midwest (“Hartford”) to exclude the testimony of expert witness
18 Lorraine Davis. Dkt. # 61. Plaintiff Steven Wilson requested oral argument; Hartford
19 did not. The court finds oral argument unnecessary. For the reasons stated below, the
20 court DENIES the motion.

21 **II. BACKGROUND & ANALYSIS**

22 The parties disagree sharply over the value of 108 photographic transparencies
23 stolen from Mr. Wilson’s home. Hartford believes they are worth \$324. Mr. Wilson,
24 who compiled the transparencies by choosing the best among the tens of thousands of
25 photographs he took over the course of a 40-year career as a professional wildlife
26 photographer, believes that they were priceless. Ms. Davis, an accredited appraiser of
27 photography, believes that they were worth about \$235,000.

28 ORDER – 1

1 There is no dispute that Mr. Wilson, who has retired from professional
2 photography, had no intention to sell or otherwise commercialize any of the
3 transparencies. Hartford is convinced that this dooms any attempt to determine a market
4 value for the transparencies. In Hartford's view, because Mr. Wilson had no intent to
5 place the transparencies on the open market, he cannot look to what the transparencies
6 would have fetched on the open market as a measure of their value.

7 The court has twice rejected Hartford's view as a matter of law. It did so the first
8 time in a March 25, 2011 order denying the parties' motions for summary judgment:

9 Mr. Leon[,] [Hartford's expert witness,] and Hartford jointly rely on the
10 erroneous premise that the undisputed fact that Mr. Wilson had no intent to
11 sell or otherwise commercialize the stolen transparencies is relevant to their
12 value. They contend that this means that the transparencies cannot be
13 valued as property to be sold for commercial use. They are wrong as a
14 matter of law. Mr. Wilson's subjective intent is irrelevant. The fair market
15 value analysis requires the fact finder to assume that the seller is willing to
16 part with his property, and will seek the highest price the market will bear.

17 Dkt. # 53 at 3-4. Hartford disagreed with the court's ruling, and moved for
18 reconsideration. The court denied that motion in an April 15, 2011 order, and thus
19 rejected for a second time Hartford's theory of valuation.

20 Ms. Davis took an approach to valuing Mr. Wilson's transparencies that is
21 consistent with the court's ruling. She noted that the primary value of a transparency is
22 not the transparency itself, but the right to use the transparency to make reproductions.
23 She considered the income received from licensing reproduction rights for other
24 professional-quality wildlife photographs, and using this stream-of-income approach,
25 estimated the total value of the stolen transparencies at about \$235,000.

26 Hartford deposed Ms. Davis on April 8, 2011. Although the court had by then
27 rejected Hartford's view that Mr. Wilson's intent not to commercialize the transparencies
28 made it impossible to assign them a market value, Hartford's counsel used the deposition,
in large part, to attempt to badger Ms. Davis into accepting Hartford's view.

1 Early in the deposition, Hartford's counsel showed Ms. Davis evidence that Mr.
2 Wilson had not commercialized the transparencies prior to their theft, and had no intent
3 to do so in the future. Ms. Davis was not previously aware of Mr. Wilson's subjective
4 intent. Hartford seems to think this highly significant. The court does not. The court has
5 already ruled that Mr. Wilson's subjective intent does not matter for purposes of
6 assigning a market value. Had Ms. Davis been informed sooner of Mr. Wilson's
7 subjective intent, it would not have affected her opinion of the value of the
8 transparencies. The court says this with confidence because Ms. Davis said it with
9 confidence during her deposition, dozens of times.

10 Q: I would like you to assume, for a moment, that [Mr. Wilson] never
11 intended to secure any income. . . . Does that change your opinion?

12 A: No, because the estate can still go on to get income from it.

13 Davis Dep. at 14-15.¹

14 Q: Would you agree . . . that given the fact that he had no income
15 expectation for these photo transparencies, that he's not entitled to a
16 lost income analysis . . . recompensing him for his loss?

17 A: The intrinsic value still lies there.

18 *Id.* at 15.

19 Q: [W]ouldn't you agree that for him, as opposed to maybe his estate,
20 he has no right to a future income analysis, given his intention?

21 A: No. Because the intention – he can change his mind, and the
22 intrinsic value is still there. The intrinsic value never changes.

23 *Id.* at 20-21.

24 Q: [W]ould you agree that a lost future income approach is
25 inappropriate, given the total intention not to have such income?

26 A: No. It's still intrinsic value. Sorry.

27 ¹ A complete transcript of Ms. Davis's deposition is attached as Exhibit 1 to the declaration of
28 Mr. Wilson's counsel. Rodihan Decl. (Dkt. # 67), Ex. 1. For the sake of brevity, the court's
 quotations of the deposition transcript occasionally omit objections and other interjections, where
 their omission is immaterial.

Id. at 21.

A: Whether he chooses to use [the transparencies] or not is his business, but the value's still there.

Id. at 22.

Q: Have I convinced you . . . that he had no intention to use these commercially?

A: Correct.

Q: All right. Now, can we agree that the income stream approach is incorrect, given that?

A: They still have intrinsic value.

Id. at 51.

At some point, counsel modified his tactic of asking the same question over, and over, and over again, by questioning Ms. Davis's honesty and professionalism while asking the same question over, and over, and over again.

Q: To be intellectually honest, we have to take the income stream off the table, with respect to Mr. Wilson's claim, do we not?

A: The intrinsic value is still there. Whether he chooses to use it or not is his prerogative.

Id. at 52-53; *see also id.* at 52, 57 (additional comments on Ms. Davis's lack of "intellectual honesty").

Q: So, you're an expert, you have ethics, you have professional responsibility?

A: Yes.

Id. at 54

The basis of Hartford's current motion is apparently that, by badgering and belittling Ms. Davis, it was able to obtain a few answers that, when stripped of context, give superficial support to Hartford's claim that Ms. Davis abandoned her stream-of-income valuation approach.

1 Q: Mr. Wilson has said that he never intends to do that [commercialize
2 his transparencies.] Now come on. It's time to be honest.
3 A: Yes. Yes. I would have to pull that.
4 Q: Pull the income?
5 A: Yes, approach.
6 Q: Lost income approach?
7 A: Right.

8 *Id.* at 55.

9 Reading the deposition in its entirety reveals that Hartford's counsel was able to
10 obtain these "concessions" only by having Ms. Davis assume that Mr. Wilson had taken
11 steps to irrevocably destroy the legal right to make and sell reproductions from his
12 transparencies. When not being verbally battered into accepting this contrary-to-fact
13 assumption, Ms. Davis stuck to the opinion that she consistently expressed throughout the
14 deposition.

15 Q: I intend to skip, in my questions, all references to what you call the
16 stream of income, because I believe we're at the point where that's
no longer part of your opinions. Is that fair?

17 A: It's still in the intrinsic value.

18 *Id.* at 70.

19 Q: There's a lot of intellectual dissidence in this.

20 A: The – the – the intrinsic value, even if it isn't valuable to him, it is
21 valuable to somebody.

22 *Id.* at 82.

23 Although Mr. Wilson's counsel could not stop Hartford's counsel's inappropriate
24 questioning, he was able to ask his own questions, which left no doubt that Ms. Davis's
25 opinion of the value of the transparencies was not affected by Mr. Wilson's disinterest in
26 commercializing them.

1 Q: So if the owner of a transparency prefers to keep it private to
2 himself, does that make the transparency worth any less?

3 A: No. The intrinsic value is still there because it's – again, it's what
4 the highest and best use would be for that.

5 *Id.* at 105.

6 Q: [Hartford's counsel] asked you a lot of questions about Mr. Wilson's
7 own preference not to license the transparencies for commercial use.
8 . . . Does any of that change your opinion on the market value of
9 those transparencies?

10 A: No.

11 *Id.* at 108.

12 Q: Can you tell us whether any of the information Mr. Hayes presented
13 to you today changes your opinion on the market value – on the
14 actual cash value of Mr. Wilson's 108 stolen transparencies?

15 A: No.

16 Q: You mean it does not change your opinion?

17 A: No. It doesn't change my opinion. I still believe that the intrinsic
18 value of transparencies are in the image, what the image was of, the
historical significance, the composition. They were his best works
of his entire life, as far as he was concerned. I believed him, and in
my opinion, that's why that valuation – my valuation, I think, is
appropriate.

19 *Id.* at 108-09.

20 Undaunted, Hartford's counsel resumed questioning, returning to the same tactics.

21 Q: Now, are you waffling on that, one last time?

22 A: Again, I always have to do it because –

23 Q: Waffle?

24 A: -- the intrinsic value of a negative and a slide is in the reproduction
25 rights. That [Mr. Wilson] chose not to use those reproduction rights
doesn't mean that the value goes away.

1 *Id.* at 122. The court notes that in this series of questions, Hartford’s counsel accused
2 Ms. Davis of “waffling” for the third and fourth time over the course of the deposition.
3 He would go on to accuse her twice more. *Id.* at 72, 74, 123, 124. Later, he again
4 managed to badger Ms. Davis into suggesting that she could not use her lost-income
5 valuation approach. Having succeeded in this dubious feat, counsel offered Ms. Davis a
6 sarcastic “Congratulations.” *Id.* at 124.

7 Nonetheless, Ms. Davis returned, as she did over and over again, to the opinions
8 she consistently expressed.

9 Q: There’s no intrinsic value to something that’s not put commercially
10 on the market. We’ve already agreed, correct?

11 A: No. We haven’t agreed that there’s no intrinsic value.

12 *Id.* at 127.

13 Q: Have you ever had another case where somebody has a personal
14 collection that’s been restricted from commercial use where the
15 valuation has, nonetheless, been a commercial evaluation? Have
16 you ever had a case like that?

17 A: No.

18 Q: Okay. Because it’s an inherent contradiction, isn’t there?

19 A: I know. There is. There’s a complete contradiction, and that’s why,
20 because there’s an intrinsic value, and if he says, I’m not going to do
21 it, but that still doesn’t erase the value, it’s just that he’s not using
22 the value at the moment.

23 *Id.* at 128.

24 Having reviewed Ms. Davis’s deposition, the court now turns to Hartford’s
25 argument that she should not be permitted to testify. Hartford first asserts that she
26 abandoned her stream-of-income valuation approach at her deposition. It then contends
27 that she did not perform any other type of valuation analysis, so she should not be
28 permitted to offer a new analysis now. The first assertion is manifestly false. Hartford
 was able to support that assertion only by misleadingly presenting excerpts of Ms.

Davis's deposition. Hartford's request that she be prevented from offering new valuation opinions is an empty one, because she has no intent to do so. She intends to rely on the valuation opinions she has consistently expressed throughout this litigation.

The court expects that Ms. Davis will have little difficulty explaining her valuation opinions in her direct testimony at trial. Moreover, at trial, she will not be subject to the same relentlessly repetitive and otherwise inappropriate questioning to which she was subject at her deposition. The court has seriously considered various alternatives to address counsel's inappropriate manner of examination. For now, the court will simply admonish counsel that if he repeats his deposition performance when examining Ms. Davis for trial, he will face sanctions personally, and his client may face an adverse jury instruction. There are no doubt many ways to challenge Ms. Davis's opinions on cross-examination, but there will be no repeat of the inappropriate manner in which counsel conducted her deposition.

The court reiterates the legal ruling it has made twice already: Mr. Wilson's disinterest in marketing the stolen transparencies does not affect their market value. This is a legal ruling, not a factual one. No one, neither a witness nor a lawyer, will be permitted to contradict that legal ruling before the jury.

III. CONCLUSION

For the reasons stated above, the court DENIES Hartford's motion to exclude Ms. Davis's testimony. Dkt. # 61.

DATED this 5th day of July, 2011.

Richard D. Jones

The Honorable Richard A. Jones
United States District Judge